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19 IN THE UNITED STATES DISTRICT COURT
20 FOR THE DISTRICT OF MONTANA
21 BILLINGS DIVISION
22

23 UNITED STATES OF AMERICA,
24
25 Plaintiff,
26
27 - vs -
28 JOSHUA CLAUSE
29 Defendants.
30

Cause No. **CR-18-101-BLG-SPW-02**

**DEFENDANT'S BRIEF RE:
MOTION TO SUPPRESS
EVIDENCE.**

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32 COMES NOW, the Defendant by and through counsel of record, the Judnich
33 Law Office, and files the Defendant's Brief in Support of the Defendant's Motion
34 to suppress evidence for lack of probable cause to initiate an investigatory stop.
35

36
37 BACKGROUND FACTS
38

39 On June 27, 2018 Trooper Kipela of the Montana Highway Patrol was
40 parked and viewing traffic when Trooper Kipela initiated an investigatory stop of
41 the Defendant's vehicle. Trooper Kipela has testified via affidavit that the only
42 reason for the investigatory stop of the vehicle, was that he believed it was
43

1 following too closely to the vehicle in front of it. The vehicle appropriately pulled
2 over after Trooper Kipela activated his overhead lights and Trooper Kipela made
3 contact with the occupants of the vehicle. After approaching the vehicle, Trooper
4 Kipela smelled what he believed to be marijuana in the vehicle, and subsequently
5 seized the vehicle and searched the vehicle, discovering alleged illegal substances
6 within the vehicle. Further facts are not relevant to the legal issue presented in this
7 Motion.
8

9 10 **ARGUMENT**

11 12 **I. TROOPER KIPELA DID NOT HAVE PARTICULARIZED** 13 **SUSPICION OF A TRAFFIC VIOLATION TO SUPPORT AN** 14 **INVESTIGATORY STOP OF THE VEHICLE.**

15 The Fourth Amendment to the United States Constitution and Article II,
16 Section 11, of the Montana State Constitution protect against unreasonable
17 searches and seizures, including brief investigatory stops of vehicles. *State v.*
18 *Elison*, 2000 MT 288, ¶ 15, 302 Mont. 228, ¶ 15, 14 P.3d 456, ¶ 15. The United
19 States Supreme Court has recognized an exception to the general warrant
20 requirement of the Fourth Amendment, pursuant to which a law enforcement
21 officer can make an investigatory stop of a motor vehicle without probable cause
22 when the State can establish: (1) objective data from which an experienced officer
23 can make certain inferences; and (2) a resulting "particularized suspicion" that the
24 occupant of the vehicle is or has been engaged in wrongdoing or was a witness to
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1 criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d
2 621 (1981). The Montana Supreme Court adopted the Cortez holding in *State v.*
3 *Gopher*, 193 Mont. 189, 194, 631 P.2d 293, 296 (1981); *State v. Gilder*, 295 Mont.
4 483, ¶ 10, 985 P.2d 147, ¶ 10 (1999). The Montana Supreme Court reinforced this
5 standard and dismissed a criminal case where a police officer failed to have cause
6 to investigate, as in this case. *See State v. Hoover*, 2017 Mont 236, 2017 WL
7 4173472. In *Hoover* the Montana Supreme Court held, an officer with only a
8 generalized suspicion of a crime does not rise to the level of particularized
9 suspicion, resulting in the inability to circumvent an individuals constitutional
10 rights. *Hoover* ¶30.

11
12 In this case, Trooper Kipela lists the only reason for conducting an
13 investigatory stop was that the Defendant’s vehicle was “following too closely”
14 which is listed in the Montana Traffic Code under Mont. Code Ann. § 61-8-329.

15 That statute states:

- 16 (1) The driver of a motor vehicle may not follow another vehicle more closely
17 than is reasonable and prudent, having due regard for the speed of the
18 vehicles and the traffic upon and the condition of the roadway.

19 Trooper Kipela’s onboard dash camera recorded the driving behavior
20 observed through the windshield of Trooper Kipela’s vehicle. Snapshots of this
21 interaction show the Defendant’s vehicle behind a commercial vehicle.
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12 (Commercial vehicle, with Defendant's vehicle following)

13 The distance between the commercial vehicle and the Defendant's vehicle
14 appears to be reasonable and prudent for highway speeds and allowed a vehicle
15 in the adjoining lane to safely pass both vehicles.
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1 The above picture, shows the tail end of the commercial vehicle, with another truck
2 passing the Defendant's vehicle in the passing lane. The distance between the tail
3 end of the commercial vehicle (the vehicle in front of the Defendant's vehicle), and
4 the front of the Defendant's vehicle appears to be reasonable.
5



19 This final screenshot of the Trooper's dash camera clearly shows the Defendant's
20 Red SUV vehicle at a distance behind the commercial vehicle that is longer than
21 the quad cab sized truck passing both vehicles in the adjoining lane. Thus, the
22 distance between the Defendant's vehicle and the vehicle in front of it, is more
23 than a vehicle's length, and appears to be reasonable under the clear conditions.
24 Absent additional objective facts observed by the Trooper, the video evidence in
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1 this case suggests the investigatory stop was not supported by particularized
2 suspicion of a crime.

3
4 The facts of this case are analogous to several cases in which questionable
5 driving behaviors observed by police officers were insufficient to allow for
6 particularized suspicion to justify a traffic stop. *See State v. Lafferty*, 1998 MT 247,
7 291 Mont. 157, 967 P.2d 363 (crossing the fog line twice and driving on it once
8 was insufficient, without other relevant circumstances, for particularized
9 suspicion); *Morris v. State*, 2001 MT 13, 304 Mont. 114, 18 P.3d 1003 (merely
10 “drifting” over the fog line with no other evidence of speeding or erratic driving
11 insufficient for particularized suspicion); *State v. Reynolds*, 272 Mont. 46, 899
12 P.2d 540 (1995)(driving which was “bordering on traveling too fast” and waiting
13 too long at an intersection with no traffic laws broken insufficient for
14 particularized suspicion). As the Trooper failed to have particularized suspicion of
15 the Defendant’s vehicle following more closely than is reasonable to the vehicle in
16 front of it, without additional objective facts, fails to rise to the level of suspicion
17 to conduct an investigatory stop, and was thus unlawful.

18
19 **II. UNDER THE FRUIT OF THE POISONOUS TREE DOCTRINE,**
20 **ALL EVIDENCE OBTAINED AS A RESULT OF THE**
21 **UNLAWFUL STOP IS TAINED AND MUST BE EXCLUDED**
22 **FROM TRIAL BY THE COURT.**

23
24 It is well established that evidence obtained as a result of unlawful conduct
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26 by the Government should be excluded from evidence as tainted fruit of the
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1 unlawful conduct. *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407 (1963). As in this
2 case, because no particularized suspicion existed to warrant an investigatory stop
3 of the vehicle, all evidence derived from the contact during that stop must be
4 excluded from evidence. It was only upon the Trooper stopping the vehicle and
5 having close contact with the vehicle that lead the Trooper to seize the vehicle and
6 ultimately search it and discovery alleged illegal substances. There does not appear
7 to be any distinguishable conduct that would have otherwise lead to the discovery
8 of this evidence to purge it of the primary taint. *See United States v. Cella*, 568
9 F.2d 1266, 1284-87 (9th Cir. 1977).

13 For these reasons, under the *Wong-Sun* analysis, this Court should exclude
14 all evidence obtained by law enforcement subsequent to the investigatory stop of
15 the Defendant's vehicle.

18 DATED this 28th day of August, 2018.

20 By: /s/ Martin W. Judnich
21 Martin W. Judnich
22 Attorney for Defendant
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3 **CERTIFICATE OF SERVICE**
4 **L.R. 1.4(c)(2)**

5 I hereby certify that on the 29th day of August, 2018, a true copy of the
6 foregoing document was served on the following persons by the following means:

7 1,2 CM-ECF

8 Hand Delivery

9 Mail

10 Fax

11 3 E-mail

12 1. Clerk, United States District Court

13 2. Colin Rubich
14 Assistant United States Attorney
Counsel for the United States of America

15
16 /s/ Martin Judnich
17 Judnich Law Office
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